UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

GREENBRIER VMC, LLC D/B/A GREENBRIER VALLEY MEDICAL CENTER	:	Case No. 10-CA-094646
and	:	
NATIONAL NURSES ORGANIZING COMMITTEE	:	

RESPONDENT'S REPLY TO CHARGING PARTY'S ANSWERING BRIEF TO RESPONDENT'S EXCEPTIONS

As the Respondent in the above-captioned case, Greenbrier VMC, LLC d/b/a Greenbrier Valley Medical Center (hereafter, "Greenbrier" or the "Hospital") hereby submits, by and through the Hospital's Undersigned Counsel, this Reply to the Charging Party's Answering Brief to the Respondent's Exceptions to the Decision (hereafter, the "Decision") issued by Administrative Law Judge Robert Ringler (hereafter, the "Judge") in the above-captioned case on January 23, 2014.

ARGUMENT[1]

The Charging Party, National Nurses Organizing Committee (hereafter, the "Union" or the "NNOC") has submitted an Answering Brief in this case that is rife with precisely the same errors that plague the Decision. The NNOC's Answering Brief is as presumptuous as it is unsupported by the record. Therefore, since the NNOC has been wholly unable to offer any meaningful substantiation of the Judge's Decision, the Hospital renews its Exceptions to the error-laden Decision and requests that it be overturned.

[1] For a statement of this case and discussion of the underlying facts, the Respondent respectfully refers the Board to its Brief in Support of Exceptions.

1. The Union's Answering Brief Improperly Raises Issues not Included in the Underlying Complaint or Litigated by the Parties

Despite clear law preventing such inclusion, the Union's Answering Brief contained arguments concerning two allegations that were both dismissed by the Region in issuing the underlying Complaint in this case. First, in keeping with the Judge's improper and erroneous Decision, the Union's Answering Brief makes multiple attempts to argue that the written warning issued to Registered Nurse James Blankinship violated the National Labor Relations Act (hereafter, the "Act"). The Union knows full well that its allegation regarding the written warning was not pursued to Complaint by the Region. Compare the Complaint (GC Ex. 1(g)) with the original second amended charge (GC Ex. 1(e)). Despite issuing the same blanket statement as the Judge - that the written warning was litigated by the parties during the underlying hearing - the Union references no section of the transcript from that hearing to support its assertion. (Ans. Br. 5). Put simply, the Union's omission of specific references to the transcript is due to the fact that the issue was not litigated by the parties in any manner. In fact, because the written warning was so clearly not a part of the case before the Judge, the Union did not even include arguments regarding the written warning in its Post-Hearing Brief. Both the Union and the Judge have failed to prove that the allegation concerning the written warning was fully litigated before the Judge. Accordingly, in keeping with Board precedent whose applicability was unrebutted by the Union's Answering Brief, the findings, conclusions and remedy related to the written warning in the Decision should be overturned. See Aztec Bus Lines, 289 NLRB 1021, 1057 (1988); H.C. Thomson, 230 NLRB 808, 811 (1977).

Equally disturbing are the Union's repeated attempts to re-introduce into this litigation the issue of Rose's alleged statements of futility regarding employees' Weingarten rights, a claim explicitly dismissed by the Regional Director. See Ans. Br. 2, 15. In so doing, the Union

improperly attempts to rely upon an allegation that was dismissed by the Regional Director, as well as the Board on appeal, and also violates the Board Rules and Regulations governing the appropriate content for a party's Answering Brief, which is limited to only those issues raised by an opposing party's exceptions and brief in support thereof. See NLRB Rules and Regulations Sec. 102.46(3)(f)(1). The NNOC refuses to accept the fact that its baseless allegation was dismissed by the Region and then dismissed again on appeal. Worse yet, like the Judge, despite the dismissal by both the Regional Director and the Board, the Union erroneously points to the allegedly unlawful incident as the sole basis for an attribution of animus by Emergency Department Director Connie Rose.

In fact, the Union continues to cling to its unsubstantiated and properly dismissed claims like the last piece of wreckage from a sinking ship because those claims are the only evidence the Union can muster of evidence of animus on the part of Ms. Rose. As such, the Hospital's Brief in Support of Exceptions persuasively explains why the evidence is insufficient to support the Judge's finding of a prima facie Wright Line case - an unassailable argument that the NNOC does not even address in its Answering Brief. This is but a symptom of the overall failing of the Judge's Decision to properly substantiate his conclusion on Wright Line. In sum, the alleged statements of futility were never properly before the Judge, and the NNOC's attempted end-run around procedure is both improper and unpersuasive. Consequently, the Union's argument should be ignored for the improper distraction that it is, and the Judge's insufficient and legally erroneous Wright Line analysis should be overruled.

2. The Union's Arguments are Wholly Unsupported by the Record and Misconstrue the Evidence

When the Union's Answering Brief finally turns to matters that were, in fact, properly before the Judge, the results are similarly unimpressive. Like the Judge's Decision, the Union's

Answering Brief is filled with statements and assumptions that are unsubstantiated by the record developed in the underlying case before the Judge. First, the Union's Answering Brief entirely misrepresents the nature of the Performance Improvement Plan (hereafter, "PIP") issued to Mr. Blankinship. The Union and the Judge both improperly mischaracterize a PIP as discipline. (Ans. Br. 6, 16). In support of this theory, the Union points to the fact that a section on PIPs is included in the Hospital's Discipline Policy. However, the Union errs when it states that the Discipline Policy "clearly incorporates" a PIP as a form of discipline. (Ans. Br. 6). The section of the Hospital's Discipline Policy that addresses PIPs is separate and distinct from the Progressive Discipline section, which clearly outlines each step of the Hospital's progressive policy. See GC Ex. 11 (Section 3 is entitled "Disciplinary Actions" and PIPs are not mentioned. By contrast, PIPs are the only subject addressed by Section 8). Accordingly, it is clear that the Hospital intended for PIPs to serve as a remedial tool entirely separate from the escalation of progressive discipline.[2] This is further proven by the fact that, in cases where other RNs received a PIP, the discipline that they received after the PIP was not more severe in nature. See R Ex. 4, 6. (RN Richard Post was issued a written warning by Rose for an incident preceding the PIP and a written warning by Rose for incident that occurred after he completed the PIP.) In other words, the PIP did not move the individual placed on the PIP "up" in the scale of progressive discipline.

Furthermore, the Union undermines its own position on the subject while discussing the particular PIP issued to Mr. Blankinship. On multiple occasions throughout its Answering Brief,

[2] The Union's argument that the PIP must be disciplinary because the written PIP form includes a warning that failure to comply with the PIP can lead to termination is equally unpersuasive. (Ans. Br. 18). It is not the PIP itself that subjects an employee to increased likelihood of termination, but rather, an employee's continuing failure to properly perform their job duties, despite the assistance provided through the remedial aspect of the PIP.

the Union points out that all the tasks assigned to Mr. Blankinship as part of his PIP were tasks that Blankinship would have been required to complete as part and parcel of his ongoing employment with the Hospital, even if he were not on a PIP or subject to any form of discipline. (Ans. Br. 6, 18). As such, the Hospital requiring Blankinship to be accountable for the completion of those tasks cannot be described as punitive in any way, and the NNOC provides no explanation for its baseless assertion that requiring someone to complete the tasks that form a regular obligation of their position can be termed disciplinary in nature. Finally, the Union is simply incorrect in its assertion that Blankinship was only one of two employees to be placed on a PIP since 2010. (Ans. Br. 7). Rather, the record reflects that, while Blankinship was one of two Registered Nurses to be placed on a PIP, there were indeed other employees at the Hospital who were also placed on PIPs in order to monitor and improve their performance. See R. Ex. 12.

Next, the Union's Answering Brief entirely misconstrues the evidence with regard to the Hospital's decision to assign Blankinship to a later shift. The Union argues that Blankinship's assignment to a later shift was punitive in nature, and therefore violated the Act. (Ans. Br. 19). However, in direct contradiction to its assertion of punitive intent, the Union highlights the testimony of Charge Nurse Rae Smith, who stated that every nurse in the Emergency Department would benefit from the additional support available on the later shift to which Blankinship was assigned.[3] (Ans. Br. 13). As such, it follows that, to the extent Blankinship was singled out by the Hospital in any manner with regard to his schedule, he was, by the Union's own admission,

[3] It is notable that, while willing to take Charge Nurse Smith on her word regarding the benefits of the later shift to Registered Nurses, the Union maintains that the Judge's credibility determination, which entirely discredited Smith's testimony, was proper. (Ans. Br. 13). Furthermore, the Union contradicts itself by crediting Smith's testimony on the subject of the support available shift assignments, but ignoring entirely her testimony, which Blankinship confirmed during his own testimony, that the shift to which Blankinship was assigned was less busy than the morning shift. See Ans. Br. 19; Tr. 177.

singled out for more favorable treatment than other nurses, as he was given the advantage of additional support that would benefit every nurse in the Department.[4] It is notable that the same rationale applies to the Union's attempts to characterize the PIP as a disciplinary, punitive measure by illustrating that there were not similar PIPs issued to other Registered Nurses. (Ans. Br. 17). Rather than illustrating the punitive nature of the PIP, the Union simply illustrates that Blankinship was given an additional opportunity to improve his performance, one that is not often routinely afforded to all Registered Nurses.

Furthermore, the Union's attempt to use Rose's support of Blankinship's application to work in the Same Day Surgery Department as evidence of Rose's professional opinion of Blankinship is directly contradicted by the evidence in the record. The Union's assumption that Rose must have thought highly of Blankinship because she approved his request to transfer to the Same Day Surgery Department is pure conjecture. (Ans. Br. 18). There is no evidence in the record to support the Union's contention that the Same Day Surgery position was as difficult a position as the Emergency Department position nor is there any support in the record for the proposition that the Same Day Surgery position had a similarly frenetic pace or level of stress as the Emergency Department position. Furthermore, the Union's entirely unsubstantiated conjecture regarding Rose's opinion of Blankinship based on the Same Day Surgery transfer approval is quite concretely rebutted by Blankinship's substandard performance evaluations and

[4] The Union's claims that Blankinship's schedule change was not logically connected to his errors because there was no evidence that his errors occurred when the Department had lower staffing is similarly unsupported by the record developed at the hearing before the Judge. (Ans. Br. 19). A multitude of testimony was developed during the hearing regarding Blankinship's difficulties performing under pressure and in stressful situations. Tr. 212, 301, 311. This is very logically connected to fluctuations in staffing. Furthermore, regardless of whether Blankinship's errors occurred when he had ample support or when the Department was very busy, the Hospital had every right, and in fact every obligation, to prevent a situation where low staffing and the resulting stress caused Blankinship to commit an error in the future.

Rose's testimony that Blankinship was the lowest-scoring Registered Nurse in the entire Emergency Department. (R. Ex. 3, T. 399).

Finally, the Union's contention that Blankinship's PIP was improperly extended on the basis of his failure to improve his documentation is completely unsupported by the record. (Ans. Br. 20). First, the Union's claim that Blankinship's prior discipline for failing to document the use of restraints on a patient was unrelated to the written warning and the PIP at issue in the case is incorrect. (Ans. Br. 6). Blankinship's failure to properly document the use of restraints on a patient is further evidence of his documentation deficiencies, and is similar in nature to his ongoing failure to chart in a timely and accurate fashion. (R. Ex. 8). This deficiency was also noted in Blankinship's most recent performance evaluation, completed well before the Union's campaign at the Hospital began. (R. Ex. 3). Accordingly, the inclusion in Blankinship's PIP of the goal of more timely and accurate documentation was solidly based on Blankinship's proven deficiency in this important area of nursing care. Second, though the Union correctly points out that the documentation goal was not included in any discipline issued to Blankinship (because a PIP is not discipline), the Union incorrectly fails to recognize that the documentation goal was explicitly included on Blankinship's initial PIP. (Ans. Br. 7; GC Ex. 5). Accordingly, Blankinship had every reason to know that his documentation required improvement, and he knew that he was supposed to be working on completing more timely and accurate documentation while working on his PIP. As such, an extension of time to continue working on his documentation was a perfectly appropriate measure for the Hospital to take, and in no way demonstrates animus, improper motivation, or "shifting justifications" on the part of the Hospital. See Ans. Br. 20.

3. The Union's Attempts to Substitute its Judgment for that of Hospital Management are Improper and Immaterial

To add a final insult to the injury, the Union's Answering Brief commits the same arrogant error as the Judge's Decision by substituting the Union's undeniably biased and unrealistic judgment for the judgment of the Hospital. Despite the Union's beliefs to the contrary, the NNOC is not equipped with the ability or the right to make medical or managerial decisions on behalf of the Hospital, and its attempts to do so in its Answering Brief are due no consideration.

First, the Union attempts to substitute its judgment for the Hospital's on how Rose should have managed her Department, investigated the incidents underlying the imposition of Blankinship's PIP, and supervised Blankinship's PIP. (Ans. Br. 9, 11, 16, 18, 19). However, none of the NNOC's assertions on the subject are supported by the record, and the Union's flawed and assumption-riddled speculation about how best to run an Emergency Department pale in comparison to the expertise and experience of Connie Rose, who has served as Manager of the Emergency Department at the Hospital for 10 years, and testified credibly regarding the unrebutted practices, procedures and policies that serve to enhance patient care and keep the Department running smoothly. The Union's claims that Rose's investigation of Blankinship's errors was incomplete are particularly baseless, in circumstances where Blankinship himself admitted that he committed the acts which served as the basis for his PIP and schedule change. See Tr. 240. Additionally, the Union's claims that Rose attempted to "retroactively punish" Blankinship for his admitted errors on the job both fail to recognize the inherently retroactive nature of discipline in general, and improperly malign Rose's character based on paltry, inappropriate and unconvincing evidence of animus, as discussed above. (Ans. Br. 4).

Even more egregious is the Union's attempt to substitute its severely lacking medical expertise for that of the Hospital and its Managers. (Ans. Br. 2, 8, 11, 9, 16, 18, 19). Each instance of the Union's opining on the subject of the severity, importance or impact of

Blankinship's errors should be immediately discredited on the ground that NNOC is simply not qualified to substitute its judgment for that of the Hospital, especially in circumstances where the NNOC presented no medical evidence to rebut the testimony of medical professionals on the subject of the potential consequences of Blankinship's errors.[5] The NNOC's characterizations of Blankinship's errors as harmless "non-events" are unsupported by the record and even less impactful is the NNOC's repeated assertion that Blankinship should not have been issued a PIP because "Blankinship did not think anything" of his errors. (Ans. Br. 9, 11, 19). In fact, if anything, this provides the Hospital with all the more reason to issue a PIP to Blankinship, in the hopes that he will eventually realize the impact and gravamen of his errors. Similarly unconvincing is the Union's ironic argument that the Hospital could not truly have had serious concerns about Blankinship's performance due to the fact that Blankinship's schedule was not changed for a number of days after he was placed on a PIP – in other words, the Union's claim that the Hospital did not "punish" Blankinship soon enough for its actions to be legitimate. (Ans. Br. 19). This conclusion simply does not follow logically, as both Blankinship and the Charge Nurses who supervised him were made aware of his specific shortcomings. See Tr. 220, 314. Rather, the Record shows that that all parties involved were aware of Blankinship's shortcomings and were carefully ensuring that errors would not occur until a new schedule could be made that assigned Blankinship to the more appropriate shift. See Tr. 220. Finally, the Union's unflagging devotion to the Judge's argument that no negative medical consequences occurred as a result of Blankinship's errors is embarrassing for the Union. As a Union that represents Registered Nurses at a myriad of facilities throughout the country, the Union

[5] The Union's specific statement that Blankinship thought the doctor knew about a patient's blood pressure drop before Blankinship discharged the patient is specifically contradicted by the record. See Tr. 174.

obviously knows that this is not the standard embraced by any healthcare provider throughout the United States. It is this type of unwavering support of a clearly faulty Judge's Decision that discredits the entirety of the Union's Answering Brief, and further illustrates the need for the Judge's Decision to be overturned.

CONCLUSION

For all the foregoing reasons, the Union's Answering Brief should be recognized for what is so blatantly is – a bald-faced attempt to preserve an unlawful and erroneous decision in favor of the Union. As such, the Union's Answering Brief should be given no determinative weight, and the Hospital's legitimate Exceptions to the Judge's Decision should be upheld.

Dated: March 31, 2014
West Hartford, CT

Respectfully submitted,

Kaitlin K. Brundage
Attorney for Respondent
62 Ledgewood Road
West Hartford, CT 06107
(860) 307-3223
brundagekk@gmail.com

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CERTIFICATE OF SERVICE

The Undersigned, Kaitlin K. Brundage, being an Attorney duly admitted to the practice of law, does hereby certify, pursuant to 28 U.S.C. § 1746, that the Respondent's Reply Brief was served on March 31, 2014 upon the following:

Micah Berul
Counsel for the Charging Party
2000 Franklin Street
Oakland, CA 94612
MBerul@CalNurses.Org

Jasper Brown
Counsel for the General Counsel
National Labor Relations Board, Region
Jasper.Brown@nlrb.org

Dated: West Hartford, CT
March 31, 2014

Respectfully submitted,

_____

Kaitlin K. Brundage
Attorney for Respondent
62 Ledgewood Road
West Hartford, CT 06107
(860) 307-3223
brundagekk@gmail.com